

REMARKS

In the Office Action mailed July 21, 2010, the Examiner rejected claims 33, 34, 36, 40, 41, 53 and 59-65. By way of the foregoing amendments and the markings to show changes Claim 33, 63 and 64 are amended and Claims 33, 34, 36, 40, 41, 53 and 59-65 are pending. The foregoing amendments are taken in the interest of expediting prosecution and there is no intention of surrendering any range of equivalents to which Applicant would otherwise be entitled in view of the prior art.

Further, by the present amendment, it does not follow that the amended claims have become so perfect in their description that no one could devise an equivalent. After amendment, as before, limitations in the ability to describe the present invention in language in the patent claims naturally prevent the Applicants from capturing every nuance of the invention or describing with complete precision the range of its novelty or every possible equivalent. See, Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 62 USPQ2d 1705 (2002). Accordingly, the foregoing amendments are made specifically in the interest of expediting prosecution and there is no intention of surrendering any range of equivalents to which Applicants would otherwise be entitled.

Claim 33 is amended by inserting the phrase by an infrared output that prevents burning of the surface that includes a binder having asphaltenes so that the asphaltenes of the binder are not destroyed. This amendment is based on the subject matter of Claim 59, which is cancelled. Claim 63 is amended to replace the second "is" in Claim 63 with "may be". Claim 64 is amended to replace in line 3 the word "moved" with "movable".

Objection to the Specification

The objection to the specification is improper. In particular the method of the amendment to the specification to insert the heading by instructing that it be inserted after paragraph 11 and showing that it was inserted before paragraph 12 was clear. Headings are not paragraphs and the rules do not require that headings have paragraph numbers. In fact it is common for headings to not have separate paragraph numbers. Thus this objection must be withdrawn.

Rejection under 35 USC § 112 Second Paragraph

Claims 63 and 64 are rejected under 35 USC § 112 second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicants traverse this rejection for the reasons stated hereinafter.

Argument Rejection under 35 USC § 112 Second Paragraph

35 USC § 112 second paragraph simply requires that a skilled artisan be able to compare a composition, article or process to the claims and determine if the composition, article or process contains all of the elements of the claim. Applicants assert that Claims 63 and 64 as previously presented met this standard. Claims 63 and 64 as amended obviate this ground of rejection. With respect to Claim 63 the term "is positioned" is an appropriate term in an article claim because it illustrates the relationship of elements and is therefore proper and meets the standards articulated hereinbefore. The replacement of "is" used with "may be" used makes it clear that the positioning (relationship of the relative locations) of the rejuvenating liquid with respect to the hot new asphalt source may perform the recited function of maintaining the working temperature of the rejuvenating liquid. With respect to Claim 64 replacement of moved with movable makes it clear that the last phrase is a recitation of the relationship of two elements. Therefore this rejection is obviated and must be withdrawn.

35 USC § 103 Rejection 1

Claims 33, 34, 40, 41, 53 and 59-65 are rejected as being unpatentable over Weaver US 3,625,489 in view of Wollner et al. US 3,311,104, Edo US 4,261,669, Goodhart et al US 6,659,684 and Damp et al US 4,601,605. Claim 59 has been cancelled. Applicants traverse this rejection for the reasons stated hereinafter.

Argument 35 USC § 103 Rejection 1

The preamble of 35 USC 102 states that "A person shall be entitled to a patent unless ...". Following the word unless is a list of reasons why a person shall not be entitled to a patent. In KSR v Teleflex, supra, the Supreme Court states that the Patent Office must present evidence to support a rejection and clearly articulate why the specific disclosures of references are combinable and direct one skilled in the art to the claimed invention. The Patent Office has the burden of first establishing that each and every element is known in the art or clearly derivable from the cited art and second presenting clear reasoning why references are combinable and why a skilled artisan would modify the the disclosure of the primary reference based on the disclosure of the secondary references. In KSR v Teleflex the Supreme Court

makes it clear that the failure of the Patent Office to carry this burden means that the Patent Office has failed to carry its burden. If the Patent Office fails to carry its burden under 35 USC 102 an applicant is entitled to a patent.

Claim 33 is amended to add feature from Claim 59. The Official Action presented no specific grounds, evidence or reasoning why Claim 59 is rejected. Based on the law as recited hereinbefore, the features of Claim 59 included in Claim 33 render Claim 33 are novel and unobvious. As all of the claims in the application depend directly or indirectly from Claim 33, all of the pending claims are novel and unobvious and this rejection must be withdrawn.

The Office Action does not present any evidence that the elements inserted into Claim 33 from Claim 59 are known in the art or that the disclosure of the primary reference can be modified to include such features in combination with the other features of Claim 33. For this additional reason all of the Claims are novel and unobvious and this rejection must be withdrawn.

The Office Action cites 5 references and fails to explain why the teaching of the 5 references can be combined and why one skilled in the art would have motivation to modify the teaching of the primary reference, Weaver, with the specific teaching of the four secondary references. Absent a clear articulation of why the references are combinable and why a skilled artisan would combine the specific features of the references as suggested in the Office Action no case of prima facie obviousness is presented and this rejection must be withdrawn.

On page 3 to 4 of the Office Action it is stated as follows. "Note that because the heater of Weaver is positioned on the rear of the vehicle, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have positioned the liquid source ahead of the heater." This statement is conclusory and provides no evidence or analysis as required in *KSR v Teleflex*. A conclusory statement is insufficient to base an obviousness rejection upon. Applicants respectfully request that the next Office Action provide evidence and an explanation of why a skilled artisan would modify Weaver to include this feature or withdraw this rejection.

Damp is cited as disclosing a sensor. The Office Action does not point out where this is disclosed in Damp. Applicants request that the location of this teaching be specifically pointed out. There is no allegation or evidence provided that a sensor which functions as required in Claim 33 be utilized in an apparatus as disclosed in Weaver. Thus the rejection is deficient and must be withdrawn.

Goodhart is cited as disclosing a heater blanket. The specific location of this disclosure is not provided. Applicants request that the next Office Action point this out. Further there is no evidence provided that Goodhart discloses or motivates one skilled in the art to use a heater blanket in the manner required in the claims and this ground of rejection is deficient. The Office Action makes the conclusory statement; "Applicant's material is prior art and the thermal properties are well known to those skilled in the art". Such statement cannot support an obviousness rejection. The Official Action must provide evidence to support this conclusion. Without such evidence this ground of rejection must be withdrawn.

The Office Action states; "Regarding Claims 40, 53 and 62, a controller is inherent". Elements cannot be inherent. If such an element is known in apparatus as described in Weaver then there is evidence available to support this conclusion. Applicants request that such evidence be produced or this ground of rejection be withdrawn. The statement following the quoted statement does not appear to have any relevance to the claims; an explanation of the relevance is requested. Further no evidence or analysis is provided that it is known to include in the apparatus of Weaver controllers that perform the function required of the controllers recited in Claims 40, 53 and 62. Therefore this ground of rejection is not supported and must be withdrawn.

With regard to Claims 41 and 62 the Office Action concludes that the cab of a vehicle is sufficient to meet recitations of a storage compartment. First no evidence is provided that a "cab" is equivalent to "a storage compartment". Second, no evidence is provided that any reference discloses a cab. Third one skilled in the art would not interpret cab and storage compartment equivalently. Fourth the statement that the storage compartment is "for storing tools and equipment, a compaction roller or both" is a definition of what the storage compartment needs to be capable of storing. This limitation cannot be ignored and is contrary to the analysis of the Official Action.

The Official Action states as follows. "Regarding claims 60 and 63, the examiner takes official notice that it is well known to position a hot material source in proximity to another material to be heated in order to efficiently heat both materials." An Official Action cannot base a rejection on "Official Notice" as this is not evidence. If the alleged feature is so well known a reference disclosing this feature must be cited. What is further needed is evidence or sound reasoning why such a feature would be used in the context of the apparatus disclosed in Weaver. As no evidence is provided as to why a skilled artisan would use such a feature in the

apparatus disclosed in Weaver this ground of rejection is not sustainable and must be withdrawn.

The Official Action states as follows. "Regarding claims 61 and 64, several of the parts which suspend the heater of Weaver are broadly within the scope of a 'column'". The Official Action does not point out which parts meet this limitation as required. Further this analysis ignores the function of the column required in these claims. There is no evidence that the parts referred to are disclosed to perform the required function. Thus for this reason this ground of rejection is not sustainable.

As to Claim 65 there is no evidence presented that any reference discloses the use of a heater having the features required in the claim or the manner of how the heater is used as required in the claim. Thus the rejection of Claim 65 is not supported by the evidence.

35 USC § 103 Rejection 2

Claim 36 is rejected as being unpatentable over Weaver US 3,625,489 in view of Wollner et al. US 3,311,104, Edo US 4,261,669, Goodhart et al US 6,659,684 and Damp et al US 4,601,605 in further view of de Bruyne et al US 5,088,919. Applicants traverse this rejection for the reasons stated hereinafter.

Argument 35 USC § 103 Rejection 2

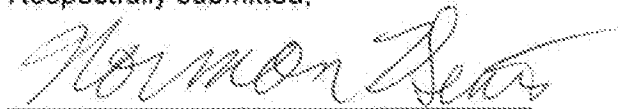
The Official Action fails to point out where in the secondary reference, De Bruyne, the alleged disclosure is located as required to support an obvious rejection. Further there is no discussion of why a skilled artisan would modify the disclosure of Weaver to introduce the specific features of the claimed invention not disclosed in Weaver. Absent this analysis this rejection is not sustainable and must be withdrawn. There is no analysis of why a skilled artisan would modify the disclosure of Weaver based on De Bruyne and Goodhart. Specifically why would a skilled artisan would modify the blanket of Goodhart to use the material of De Bruyne in the apparatus of Weaver. As this analysis is not provided this rejection must be withdrawn.

CONCLUSIONS

In view of Applicants' amendments and remarks, the Examiner's rejections are believed to be rendered moot. Accordingly, Applicants submit that the present application is in condition for allowance and requests that the Examiner pass the case to issue at the earliest convenience. Should the Examiner have any question or wish to further discuss this application, Applicant requests that the Examiner contact the undersigned at (248) 292-2920.

If for some reason Applicant has not requested a sufficient extension and/or have not paid a sufficient fee for this response and/or for the extension necessary to prevent the abandonment of this application, please consider this as a request for an extension for the required time period and/or authorization to charge our Deposit Account No. 50-1097 for any fee which may be due.

Respectfully submitted,



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